No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1960

CIVIL AERONAUTICS BOARD, PETITIONER

v.

DELTA AIR LINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the Civil Aeronautics Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appears for the Second Circuit, entered in this case on July 21, 1960.

OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 15–24) is reported at 280 F. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1960 (Appendix B, *infra*, p. 25). The jurisdiction of this Court is invoked under 49 U.S.C. 1486(f) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, once it has entered an order permitting a certificate of public convenience and necessity to become effective, is without power thereafter, in the same proceeding, to modify the certificate in response to a timely petition for reconsideration filed prior to the effective date, where the Board's order expressly reserved the right to make such modification.

STATUTE INVOLVED

Sections 401 (f) and (g) of the Federal Aviation Act (72 Stat. 755–56, 49 U.S.C. 1371 (f) and (g)) provide:

EFFECTIVE DATE AND DURATION OF CERTIFICATE

> (f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated,

the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

STATEMENT

The present controversy arises out of the so-called Great Lakes-Southeast Service case, a proceeding in which the Civil Aeronautics Board considered the long-haul service needs for an area extending roughly between the Great Lakes and Florida and a large number of applications by the trunkline carriers to serve

these needs. In order to keep the administrative proceedings within manageable bounds, the Board declined to consolidate a number of applications which had been filed by local-service carriers to provide new and improved short-haul service between certain intermediate cities in the area. Instead, it directed the institution of a separate proceeding (Great Lakes Local Service Investigation, Docket No. 4251) on those applications. However, in order to insure that this separation of the two proceedings would not deprive the local-service carriers of their rights under *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, and to give these carriers an opportunity to show the effect of a grant upon their existing operations, the Board permitted the local carriers to intervene in the long-haul proceeding.

The Board's decision in the long-haul proceeding made a number of awards, including grants permitting the respondent, Delta Air Lines (Delta), to extend an existing route northwest so as to provide service from Detroit to Miami and to add Indianapolis and Louisville as points on Delta's existing Chicago to Miami route. Although the Board imposed restrictions on a number of the new awards to protect local service carriers[1] it imposed no such restrictions with respect to some ten pairs of intermediate points on the long-haul routes Delta was authorized to serve.

[1] These restrictions normally preclude so-called "turnaround" service between two points by requiring that service between these points be only on a flight originated or terminated in some distant city.

The Board's decision and order in the Great Lakes-Southeast Service (long-haul) case was issued on September 30, 1958 (J.A. 1373a)[2] and provided that the certificates issued pursuant thereto were to become effective on November 29, 1958, unless extended by the Board prior to that date (J.A. 1384a). Within the 30 days then prescribed by the Board rules (see § 302.37 of the Board Rules of Practice, 14 C.F.R. 302.37, 1956 Rev. ed.), Lake Central Air Lines and Piedmont Aviation, local carriers which had been permitted to intervene in the proceeding to protect their interests (J.A. 78a, 82a, 83a), filed timely petitions for reconsideration. These petitions sought to impose on Delta's service to the ten pairs of cities referred to above a requirement that service to them originate or terminate at some distant city (Add'l. J.A. 1587a–1592a). Lake Central also asked that the effective date of Delta's certificate be stayed pending a Board decision on the petitions for reconsideration (*Id.* at 1591a–1592a).

On November 28, 1958, one day prior to the proposed effective date of the certificates, the Board issued a lengthy memorandum and order (E–13211) in response to the numerous requests for stay which had been filed in connection with the 16 petitions for reconsideration of its September 30 decision. With one exception not here relevant, these stays were de-

[2] "J.A." refers to the three-volume Joint Appendix filed in Case Nos. 25,422, etc., in the court below and, by stipulation, made part of the record in this case. "Add'l. J.A." refers to the blue-covered Additional Joint Appendix filed in the court below in the instant case, No. 25,852.

nied, the Board concluding that "the parties have not made a sufficient showing of probable legal error or abuse of discretion in our decision" and that in view of the advent of the peak winter season the "new services to Florida are immediately required", a consideration the Board felt "clearly weights the scale * * * in favor of a denial of the requested stay" (J.A. 1471a). But the Board made clear that "because of the detailed matters raised in the petitions for reconsideration, it will not be possible to finally dispose of them until after November 29" (J.A. 1470a), and that denial of the stays "is in no way prejudicial to the legal rights of those parties seeking reconsideration. Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits" (J.A. 1496a).[3]

On May 7, 1959, the Board issued an order (E-13835) disposing of the petitions on their merits (J.A. 1509a, 1517a). This order, which gives rise to the present controversy, granted Lake Central's and Piedmont's petitions and imposed restrictions on Delta's certificate to preclude operations between the ten pairs of cities unless the flights originated or terminated at Atlanta or a point south thereof (J.A. 1511a, 1512a, 1517a). In imposing these restrictions the Board noted that "[i]f, after deciding the issues presented in the *Great Lakes Local Service Case,* we con-

[3] The awards actually became effective on December 5, 1958, because of a temporary stay granted by the Board to enable the court of appeals to consider a stay request addressed to it (Add'l. J.A. 1593a–1595a).

clude that the long-haul restrictions are not required, we will have full freedom to remove them at that time" (J.A. 1512a).

The court of appeals reversed, holding that the Board, once it permits a certificate to become effective, is thereafter without power in the same proceeding to add restrictions to the certificate, even in response to a timely petition for reconsideration filed prior to the effective date of the certificate (App. A, *infra*, pp. 15–24). The court assumed that Delta was "on notice" that the Board might "modify the certificate on the basis of matters set forth in the filed petitions for reconsideration" (*id.* at 24), stating that its "holding is not based upon the fact that, prior to the date the certificate was modified, Delta inaugurated service authorized by the certificate" (*ibid.*).[1] Its view was that Sections 401(f) and (g) of the Federal Aviation Act require the conclusion that, in the absence of fraud, misrepresentation or clerical error, a certificate which the Board had permitted to become effective can thereafter be modified only in a new proceeding satisfying the requirements of § 401(g) (*ibid.*).

REASONS FOR GRANTING THE WRIT

The court below, we submit, has misconstrued the Federal Aviation Act and has misapplied court and agency decisions dealing with entirely discrete problems. In consequence, it has seriously limited the authority of the Civil Aeronautics Board to recon-

[1] On January 1, 1959, Delta had inaugurated a local flight including service between Chicago and Indianapolis, one of the ten pairs of cities to which the Lake Central and Piedmont petition for reconsideration had been directed.

sider on timely petition decisions awarding certificates of public convenience and necessity. The holding that the Board must either defer allowing the certificates to become effective or that it must finally resolve, prior to the effective date, all of the complicated issues which may be presented by the multiple petitions for reconsideration frequently filed in complex route cases is one that cannot fail to impair the administrative process. That holding, moreover, is inconsistent with the view expressed by this and other courts.

1. The court of appeals believed that its decision was compelled by the language of Section 401(f) of the Act, providing that "[e]ach certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided". This it construed as meaning that an effective certificate could not be changed in any way except after further notice and hearing in accordance with the provisions of Section 401(g), which sets out the procedure under which the Board may "alter, amend, modify, or suspend" a certificate or may revoke it. But nothing in either section purports to bar the Board from exercising its power to reconsider its decisions prior to the time a certificate has been finally granted and the

time for rehearing it has passed,[5] and the cases the court below cites to support its decision are clearly inapposite.[6]

We believe that the procedures of Section 401(g) do not come into play until, as this Court has indicated with respect to the comparable provisions of the Motor Carrier Act, 49 U.S.C. 312, "the certificate [has been] finally granted *and the time fixed for rehearing it has passed*". *United States* v. *Seatrain Lines*, 329 U.S. 424, 432 (emphasis added). A similar view has been expressed by the Court of Appeals for the District of Columbia Circuit with specific reference to the authority of the Civil Aeronautics Board, *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 259 F. 2d 808 (C.A.D.C.). There, the court rejected an argument that the Board's order on reconsideration, which included an amendment of an effective award, was "a nullity because it was rendered * * * after the certificates previously issued had become effective" (*id.* at 810). See, also, *Western Airlines, Inc.* v. *Civil Aero-*

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[5] There is, of course, no question of the Board's power to reconsider pursuant to its Rules of Practice (§ 302.37). "The power to reconsider is inherent in the power to decide." *Albertson* v. *Federal Communications Commission*, 182 F. 2d 397, 399 (C.A.D.C.). It also derives from Sections 204(a), 1001 and 1005(d) of the Federal Aviation Act (49 U.S.C. 1324(a), 1481 and 1485(d). See *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133, 145.

[6] Even under the court's view of the law it would appear that respondent received, in substance, all of the protection afforded by Section 401(g). For "notice" of the proposed modification was provided by the petition for reconsideration, as well as the Board's express reservation, in its order denying a stay, of its "power to modify the certificate on the basis of the matters set forth in the filed petitions for reconsideration" (App. A, *infra*, p. 24). And any "hearings" relevant to the issue had already

nautics Board, 194 F. 2d 211, 214 (C.A. 9).[7] The essential function of Section 401(g), it seems clear, is to set forth the procedures for making changes in operative certificates necessitated by conditions arising *after* the completion of the initial licensing proceeding.

The cases relied on by the court of appeals—*United States* v. *Seatrain Lines, supra; United States* v. *Watson Bros. Transportation Co.*, 350 U.S. 927, affirming 132 F. Supp. 905 (D. Neb.); *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133, and *Smith Bros., Revocation of Certificate*, 33 M.C.C. 465—are entirely consistent with our view of the statutory scheme. All of these cases relate to the question whether an administrative agency may reopen a closed proceeding, long after disposition of any petition for reconsideration that may have been filed, to modify or revoke an outstanding certificate. Indeed, these cases lend support to the position which we urge here, for they emphasize that even in such circumstances there are occasions when a new proceeding is not required. See, *e.g.*, *American Trucking Assns.* v. *Frisco, supra*, 358 U.S. at 145–146. In any event, the Board's order here expressly left open the question of modification raised by the petition for reconsideration—the licensing pro-

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been had since reconsideration was sought on the basis of the record already made (see Add'l. J.A. 1587a–1592a).

[7] The Board has previously modified, upon reconsideration, certificates which it had allowed to become effective. See, *e.g.*, *North Central Case*, 8 C.A.B. 208 (1947); *Cincinnati-New York Additional Service*, 8 C.A.B. 603 (1947); *United-Western, Acquisition of Air Carrier Property*, 11 C.A.B. 701 (1950); *Service to Phoenix Case*, Order E–12039 (1957); *South Central Area Local Service Case*, Order E–14219 (1959).

ceeding was administratively still open, therefore, not closed.

2. The decision below has important bearing on the Board's administration of its statutory responsibilities. It disables the Board from authorizing needed services while petitions for reconsideration are pending. It affects not only the Board's power to add restrictions; it applies equally to alterations sought by the grantee, such as the addition of new points or the removal of restrictions previously imposed.[8] The consequence may be either unduly hasty decision on requests for reconsideration raising complex problems or the postponement of the effective dates of certificates with an attendant loss of needed public services and carrier revenues.[9]

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[8] A further consequence of the decision below is to create uncertainty with respect to the time for filing an appeal from the Board's order. The majority rule of the courts of appeals is that the timely filing of a petition for reconsideration tolls the time for seeking judicial review, which then runs from the date of Board action on the petition. See *e.g.*, *Braniff Airways* v. *Civil Aeronautics Board*, 147 F. 2d 152, 153 (C.A.D.C.); *Frontier Airlines* v. *Civil Aeronautics Board*, *supra*; *Waterman Steamship Corp.* v. *Civil Aeronautics Board*, 159 F. 2d 828, 829, (C.A. 5), reversed on other grounds, 333 U.S. 103. But cf. *Consolidated Flowers Shipments* v. *Civil Aeronautics Board*, 205 F. 2d 449 (C.A. 9). If, however, permitting the certificate to become effective ousted the Board from jurisdiction, it would appear that as a precautionary measure appeals would have to be filed unless the Commission had acted on the petition within the 60-day period from the original Board order (see 49 U.S.C. 1486(a)), or had previously indicated its intent to stay the effective date.

[9] Had the Board postponed the effective dates of certificates until May 7, 1959, when the reconsideration requests were decided, the peak Florida winter season travel would have been lost to the three newly certificated carriers, including Delta.

The opinion below suggests (App. A, *infra*, p. 24) that the Board might, for the future, "investigate the possibility of issuing some form of temporary authorization." [10] Since we believe that the Board, like other administrative agencies performing licensing functions, already has the power to deal with the practical problems involved by ordinary rehearing procedures, we urge that it should not be remitted to the necessity of investigating the possibility of pursuing other and less direct means of achieving a similar result. Moreover, if the court below is right in its holding that the traditional method of proceeding is not available to the Board, it may fairly be presumed that the adoption of other and oblique methods of accomplishing the same results would be open to serious challenge and would be productive of extensive new litigation.

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[10] It can well be argued that a "temporary authorization" was in substance all that respondent received (at the time its certificate became effective) since it was subject to such changes as a "full and complete consideration of the pending petitions for reconsideration" might warrant (J.A. 1496a). Cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 444–448.

CONCLUSION

The decision below raises an important question of administrative procedure which bears directly upon the ability of the Civil Aeronautics Board to perform its licensing functions effectively and expeditiously. We believe that the decision is in error and that it conflicts with views expressed by this Court and by other courts of appeals. The petition for certiorari should be granted.

Respectfully submitted.

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OCTOBER 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 248—October Term, 1959

Docket No. 25852

DELTA AIR LINES, INC., PETITIONER, *v.* CIVIL AERONAUTICS BOARD, RESPONDENT; LAKE CENTRAL AIRLINES, INC., ET AL., INTERVENORS

Before: WATERMAN and MOORE, *Circuit Judges*, and SMITH, *District Judge*.

WATERMAN, *Circuit Judge:*

Petitioner is a certificated trunk-line air carrier possessing routes that, in the main, run from the midwest to the southeast quarter of the country. The present controversy arises out of the Board's area proceeding known as the "Great Lakes-Southeast Service Case." Other aspects of this same area proceeding were recently before this court in *Eastern Air Lines* v. *CAB*, 271 F. 2d 752 (2 Cir. 1959), *cert. denied*, 362 U.S. 970. For a general description of this "area proceeding" and for a statement of the air transportation the Board had under consideration in the "Great Lakes-Southeast Service Case" we refer to our opinion in *Eastern Air Lines* v. *CAB*, *supra*.

In its decision and order in the above area proceeding, Order No. E–13024 of September 30, 1958, the Board added six cities to Delta's pre-existing Route 54, which prior to that time served Chicago and Miami with certain intermediate points, but bypassed Indi-

anapolis. The addition to Delta's authority of the three cities of Columbus, Toledo, and Detroit permitted Delta for the first time to offer service between Miami and Detroit, and for that reason this authority extension was important to the issues presented to this court in *Eastern Air Lines* v. *CAB, supra,* but it has no bearing on the question now before us. The addition of the three cities of Dayton, Louisville, and Indianapolis permitted Delta for the first time to offer service between these cities and the other cities which lay on its Route 54. Since Indianapolis already was an authorized intermediate point on Delta's Route 8 between New Orleans and Detroit, the inclusion of Indianapolis as an intermediate point on Route 54 had the additional effect, which the Board recognized and approved, of permitting Delta on the same flight, provided that the flight stopped at Indianapolis, to serve cities on both of these routes.[1] By the Board's September 30 order Delta's new certificate, incorporating this additional authority, was to become effective on November 29, with the proviso that prior thereto the Board might extend that effective date upon its own initiative or upon a petition for reconsideration of the Board's September 30 order. The new certificates of other carriers who had received new authorizations under the "Great Lakes-Southeast Service" decision had the same effective date and were subject to the same proviso.

Numerous petitions for reconsideration were indeed filed. Included among these were petitions by Lake

[1] Unless the Board imposes "restrictions" a carrier may operate flights between any combination of authorized points on a given linear route. Similarly, absent restrictions, when two routes of a carrier have a common point, the carrier may operate flights between any combination of points on the two routes via the common point.

Central Airlines, Inc., and Piedmont Aviation, Inc., two local service carriers. The new route applications of all local service carriers had been excluded by the Board from the "Great Lakes-Southeast Service Case," the Board stating that it would consider them later in a separate proceeding. The local service carriers, however, were permitted to intervene to present evidence as to the effect that an award to a trunkline carrier might have upon the local service carriers' present or contemplated operations. In their petitions for reconsideration Lake Central and Piedmont sought, *inter alia*, to have restrictions imposed on Delta's service between ten pairs of cities[2] which, as a result of the addition of Indianapolis, Louisville and Dayton to Route 54, Delta would be able to serve without restriction under the certificate authorized by the Board's September 30 decision. Lake Central's petition contained a request to stay the effective date of Delta's certificate. By order No. E–13190, dated November 21, the Board stayed the effectiveness of Delta's certificate for the period to and including December 6 for the convenience of this court in considering Eastern's request for a judicial stay. Two other certificates were also stayed for this reason. On November 28, 1958, the Board issued Order No. E–13211, which, with one exception,[3] refused to stay the effective date of any

[2] The ten pairs of cities are: Indianapolis, Ind.-Chicago, Ill.; Indianapolis, Ind.-Cincinnati, Ohio; Indianapolis, Ind.-Louisville, Ky.; Indianapolis, Ind.-Lexington, Ky.; Indianapolis, Ind.-Asheville, N.C.; Dayton, Ohio-Lexington, Ky.; Dayton, Ohio-Asheville, N.C.; Cincinnati, Ohio-Louisville, Ky.; Louisville, Ky.-Lexington, Ky.; Louisville, Ky.-Asheville, N.C.

[3] The exception was the certificate of Eastern Air Lines. Piedmont, in its petition for reconsideration, in addition to seeking to have restrictions imposed on Delta's service between the pairs of cities set forth in footnote 2, *supra*, sought to prevent the extension of Eastern's Route 6 from Charleston, W. Va.

new certificate beyond December 7. The Board assigned two interrelated reasons for its refusal to grant further stays. First, the Board found that the various reconsideration petitions did not make sufficient showings of probable legal error or abuse of discretion. Second, the Board wished to have the new services inaugurated in time for the peak period of winter travel. The Board's opinion in Order No. E–13211 closed with the statement that the order was not a disposition of the several petitions for reconsideration on their merits.[4]

On December 4 this court denied Eastern's request for a judicial stay, and, in recognition thereof, on December 5 the Board by Order No. E–13245 dissolved the stay imposed by Order No. E–13190. Accordingly, on December 5, 1958, Delta's certificate became effective. On January 1, 1959, pursuant to schedules filed with the Board, Delta inaugurated service between Chicago and Indianapolis, with flights continuing beyond Indianapolis southward to Evansville, Indiana, a city Delta was authorized to service on its previously established Route 8.

On May 7, 1959, the Board issued the order here complained of, Order No. E–13835.[5] This order con-

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to Chicago. In its opinion accompanying Order No. E–13211, the Board held that Piedmont's objections to Eastern's additional authorization raised serious questions; and accordingly it stayed the effective date of Eastern's new certificate until further action by the Board.

[4] The opinion stated: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits."

[5] Delta's petition also encompasses Order No. E–14044 denying Delta's motion for a partial stay in order to permit the continuance of the Evansville-Indianapolis-Chicago service, and Order No. E–14224 denying Delta's petition for a stay pending judicial review.

stituted the Board's formal disposition of the various petitions for its reconsideration of the September 30 decision. This order modified the former decision. One modification was that restrictions were imposed on Delta's service between the ten pairs of cities set forth in footnote 2, *supra*, so that a Delta flight serving any of the pairs of cities was required to originate at Atlanta or at a point on Route 54 south thereof.[6] One effect of the restrictions was to forbid the service Delta had inaugurated between Evansville and Chicago via Indianapolis unless that flight began at Atlanta and proceeded on a circuitous routing through Memphis.

The issue here is whether, on the above facts, the Board had power to alter Delta's certificate without resort to a modification proceeding under Section 401 (g) of the Act, 49 U.S.C. 1371(g).[7] It is the Board's contention that it may modify a certificate subsequent to the effective date of the certificate in the course of passing upon timely filed petitions for reconsideration of the award contained therein; and that the proceedings provided for in Section 401(g) only need to be followed after the Board has finally disposed of these petitions for reconsideration. We disagree.

Section 401(f), relating to the effective date and duration of an air carrier's certificate of public convenience and necessity provides as follows: "Each

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[6] The Board indicated that the advisability of these restrictions would be considered anew in the later local service carrier area proceeding.

[7] Between the time of the Board's initial action and the modification on reconsideration, the Civil Aeronautics Act (52 Stat. 973; 49 U.S.C. 401) was supplanted by the Federal Aviation Act (72 Stat. 731; 49 U.S.C. 1301). The provisions of the former Act here involved were re-enacted without change, and there is admittedly no issue here stemming from the supplantation of the Civil Aeronautics Act.

certificate shall be effective from the date specified therein, and *shall continue in effect until suspended or revoked as hereinafter provided* * * *"* (Italics supplied.) The phrase "as hereinafter provided" would appear to require our rejection of the Board's argument that it has some form of implied power to alter the authority conferred in an effective certificate. Section 401(g) is the only section of the Act expressly dealing with the modification of certificates. The Board maintains that power to modify an effective certificate can be found in Section 204(a), 49 U.S.C. 1324(a), but this argument is almost identical to the position taken by the Interstate Commerce Commission in *United States* v. *Seatrain Lines,* 329 U.S. 424 (1947), and there rejected by the Supreme Court, *supra,* at pp. 432–33. This holding of the Supreme Court in *Seatrain* is likewise fully dispositive of any Board reliance upon Section 1005(d), 49 U.S.C. 1485(d) as express statutory support for its position.

Save for the exceptions in Section 401(f) set forth in footnote 8, *supra,* Sections 401(f) and 401(g) are patterned very closely upon Section 212(a) of Part II of the Interstate Commerce Act, 49 U.S.C. § 312(a). In *Smith Bros., Revocation of Certificate,* 33 MCC 465, 472 (1942), the Interstate Commerce Commission in construing Section 212(a) announced the following principle: "We may issue decision upon decision, and order upon order, on an application for a certificate so

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* Section 401(f) states three exceptions, none here applicable, to the above rule. A certificate conferring temporary authority ceases to be effective upon the expiration of its term; a certificate will cease to be effective if the Board certifies that operations under the certificate have ceased; and if the carrier fails to inaugurate service authorized by a certificate within ninety days of the date of authorization, the Board upon notice and hearing may revoke the unused authority.

long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited." The Board makes a futile effort to distinguish the *Smith Bros.* case on the ground that a revocation of a certificate is more closely circumscribed by statute than a certificate's modification. Under both Sections 212(a) of Part II of the Interstate Commerce Act and Section 401(g) of the Federal Aviation Act modification differs from revocation only as to the matters the Commission or Board must demonstrate *once a proper proceeding has been instituted.* The statutory requirement to institute a proceeding is the same whether the certificate is to be modified or revoked. The *Smith Bros.* case has been frequently cited with apparent approval in the Supreme Court and other federal courts. We follow it, believing its principle to be as applicable to the Federal Aviation Act as to Part II of the Interstate Commerce Act.

It is true that in cases involving motor carriers under Part II of the Interstate Commerce Act the Supreme Court has held that, under certain closely-defined circumstances, an effective certificate may be modified by the Commission without resort to a formal proceeding under Section 212(a). For instance, in *American Trucking Ass'n* v. *Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) the Supreme Court held that the Commission may so rectify "inadvertent ministerial errors." In the present case there is no suggestion that Delta's certificate inadvertently contained greater authority than the Board intended to confer by its September 30 order. Moreover, it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective date of Delta's certificate it was fully aware of the arguments which

subsequently led it on May 7, 1959 to impose the restrictions here complained of.[9] Indeed, for this reason, the present case is similar to *Watson Bros. Transp. Co.* v. *United States*, 132 F. Supp. 905 (D. Neb. 1955), *aff'd*, 350 U.S. 927 (1956), where the three-judge district court concluded on the facts present there that the modification of a motor carrier's certificate had resulted from a change in administrative policy, and therefore held that the change was beyond the Interstate Commerce Commission's power. In any event, the present case is clearly distinguishable from the case of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (71 S. Ct. 382) (1951), *rehearing denied*, 341 U.S. 906, where the Supreme Court held that the Commission had power, apart from a proceeding under Section 212(a), to impose specific restrictions to implement an already existing but somewhat generally-phrased restriction on the type of service the carrier was certificated to perform. We are of the opinion that the imposition of a restriction on service under a certificate that previously had authorized the service without any restriction presents an entirely different matter than that before the Court in *Rock Island Motor Transit*.

The Board, seeking to justify its act here on the basis of past performance, informs us that, in the past, upon a petition for rehearing, it has modified a certificate it had allowed to become effective.[10] However, on at least one other occasion it expressed grave doubt as to its statutory power to do so. *Kansas City-Memphis-Florida Case*, 9 CAB 401, 408–09 (1948). Moreover, the Board has represented to at

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[9] See footnote 3, *supra*.

[10] *Cincinnati-New York Additional Service*, 8 CAB 603, 604 (1947) seems to be the clearest example.

least one court that it has been its practice to stay the effective date of a certificate in order to permit it time to consider the merits of reconsideration petitions. *Southwest Airways* v. *CAB,* 196 F. 2d 937, 938 (9 Cir. 1952).[11] We do not find that the Board in this particular can rely upon a consistent administrative interpretation of its statutory powers similar to the consistent interpretation found in *United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396 (1956).

Finally, the Board argues that unless we uphold its position that resort to 401(g) of the Act is unnecessary it will be confronted with a dilemma in the management of its large-scale area proceedings. In its brief the Board states: "Moreover, Delta's concept, if adopted, would be prejudicial both to the traveling public and the carriers, for in some cases it could only result either in a hasty and largely meaningless passing on reconsideration requests of a highly technical economic nature, or the further postponement of the

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[11] *Western Air Lines* v. *CAB,* 194 F. 2d 211 (9 Cir. 1952) involved a Board procedure entirely different from that in the present case. In *Western Air Lines* the Board, subsequent to the effective date of its order *approving the transfer* of a certificate, imposed labor protective conditions upon the transfer. The Board's power relative to the transfer of certificates is governed by Section 401(h), 49 U.S.C. § 1371(h) rather than Sections 401(f) and 401(g). Under Part II of the Interstate Commerce Act, the Supreme Court has stated that the Commission's power to amend an order approving the transfer of a certificate is more flexible than its power to amend a certificate. *United States* v. *Rock Island Motor Transit Co.,* 340 U.S. 419, 445–46 (1951), *rehearing denied,* 341 U.S. 906. In addition, *Western Air Lines* involved misrepresentation in testimony before the Board. There is language in *Smith Bros., Revocation of Certificate,* 33 MCC 465 (1942) indicating that if a certificate has been obtained as a result of misrepresentation it may be revoked without a formal proceeding under Section 212(a), 49 U.S.C. § 312(a).

effective dates of certificates with the attendant deprivation of needed public service and additional carrier revenues, on the small chance that a further review will result in a change of the original decision." We admit the Board's dilemma is real [12] but we find that this dilemma is inherent in the statutory scheme of Sections 401(f) and 401(g). It is our view that once a certificate has become effective, the Act requires that the Board resort to more formal—even though possibly more time-consuming—procedures to modify such a certificate, irrespective of whether the modification is entirely in the public interest.

Our holding is not based upon the fact that, prior to the date on which the certificate was modified, Delta inaugurated service authorized by the certificate. Furthermore, we have accepted, *arguendo,* the Board's argument that the language in the order quoted in footnote 4, *supra,* put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration.

We hold that under Sections 401(f) and 401(g) of the Federal Aviation Act, absent fraud, misrepresentation or clerical error in the original issuance of the certificate, it is only in a proceeding satisfying the requirements of Section 401(g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions.

Orders No. E–13835, E–14044, and E–14224 are set aside to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

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[12] We suggest, however, that the Board investigate the possibility of issuing some form of temporary authorization.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October Term, 1959

No. 248

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

LAKE CENTRAL AIRLINES, INC., ET AL., INTERVENORS

JUDGMENT AND DECREE

This cause having come on for hearing on the transcript of the record from the Civil Aeronautics Board, and the Court, upon consideration of the record, briefs and arguments of Counsel, having filed its opinion herein on June 29, 1960, it is

ORDERED, ADJUDGED AND DECREED that the orders of the Civil Aeronautics Board of which review is sought in this case be, and they hereby are, set aside to the extent that they impose restrictions on the certificate of Delta Air Lines, Inc., which became effective on December 5, 1958.

STERRY R. WATERMAN,
LEONARD P. MOORE,
U.S. Circuit Judges.
J. JOSEPH SMITH,
U.S. District Judge.

Dated: July 21, 1960.
A true copy,

A. DANIEL FUSARO,
Clerk.
By NIALL F. O'DOHERTY,
Chief Deputy Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1960